

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

LILLIAN K. MEYER,

3:18-cv-00412-RCJ-CBC

Plaintiff,

v.

NANCY A. BERRYHILL,  
 Acting Commissioner of Social Security,

**REPORT AND RECOMMENDATION**  
**OF U.S. MAGISTRATE JUDGE<sup>1</sup>**

Defendant.

This case involves the judicial review of an administrative action by the Commissioner of Social Security (“Commissioner”) denying Lillian Meyer’s (“Meyer”) application for supplemental security income payments pursuant to Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383. Currently pending before the Court is Meyer’s motion to submit new evidence, which the Court construes as a motion for remand. (ECF No. 13.) In this motion, Meyer seeks remand on the basis of new medical evidence. (*Id.*) The Commissioner filed an opposition (ECF No. 14), and Meyer filed a reply (ECF No. 15). For the reasons set forth herein, the Court recommends that Meyer’s motion for remand, (ECF No. 13), be denied.

**I. STANDARDS OF REVIEW**

A. Judicial Standard of Review

This Court’s review of administrative decisions in social security disability benefits cases is governed by 42 U.S.C. § 405(g). See *Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g) provides that “[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil

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<sup>1</sup> This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 action ... brought in the district court of the United States for the judicial district in which  
2 the plaintiff resides.” The Court may enter, “upon the pleadings and transcript of the record,  
3 a judgment affirming, modifying, or reversing the decision of the Commissioner of Social  
4 Security, with or without remanding the cause for a rehearing.” *Id.*

5 The Court must affirm an Administrative Law Judge’s (“ALJ”) determination if it is  
6 based on proper legal standards and the findings are supported by substantial evidence  
7 in the record. *Stout v. Comm’r Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006);  
8 *see also* 42 U.S.C. § 405(g) (“findings of the Commissioner of Social Security as to any  
9 fact, if supported by substantial evidence, shall be conclusive”). “Substantial evidence is  
10 more than a mere scintilla but less than a preponderance.” *Bayliss v. Barnhart*, 427 F.3d  
11 1211, 1214 n.1 (9th Cir. 2005) (internal quotation marks and citation omitted). “It means  
12 such relevant evidence as a reasonable mind might accept as adequate to support a  
13 conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842  
14 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83  
15 L.Ed. 126 (1938)); *see also Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005).

16 To determine whether substantial evidence exists, the Court must look at the  
17 administrative record as a whole, weighing both the evidence that supports and  
18 undermines the ALJ’s decision. *Orteza v. Shalala*, 50 F.3d 748, 749 (9th Cir. 1995)  
19 (citation omitted). Under the substantial evidence test, a court must uphold the  
20 Commissioner’s findings if they are supported by inferences reasonably drawn from the  
21 record. *Batson v. Comm’r, Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2003).  
22 “However, if evidence is susceptible of more than one rational interpretation, the decision  
23 of the ALJ must be upheld.” *Shalala*, 50 F.3d at 749 (citation omitted). The ALJ alone is  
24 responsible for determining credibility and for resolving ambiguities. *Meanel v. Apfel*, 172  
25 F.3d 1111, 1113 (9th Cir. 1999).

26 It is incumbent on the ALJ to make specific findings so that the court does not  
27 speculate as to the basis of the findings when determining if substantial evidence supports  
28 the Commissioner’s decision. The ALJ’s findings should be as comprehensive and

1 analytical as feasible and, where appropriate, should include a statement of subordinate  
2 factual foundations on which the ultimate factual conclusions are based, so that a  
3 reviewing court may know the basis for the decision. See *Gonzalez v. Sullivan*, 914 F.2d  
4 1197, 1200 (9th Cir. 1990).

5 B. Standards Applicable to Disability Evaluation Process

6 The individual seeking disability benefits bears the initial burden of proving  
7 disability. *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995). To meet this burden, the  
8 individual must demonstrate the “inability to engage in any substantial gainful activity by  
9 reason of any medically determinable physical or mental impairment which can be  
10 expected ... to last for a continuous period of not less than 12 months.” 42 U.S.C. §  
11 423(d)(1)(A). More specifically, the individual must provide “specific medical evidence” in  
12 support of his claim for disability. See 20 C.F.R. § 404.1514. If the individual establishes  
13 an inability to perform his prior work, then the burden shifts to the Commissioner to show  
14 that the individual can perform other substantial gainful work that exists in the national  
15 economy. *Reddick v. Chater*, 157 F.3d 715, 721 (9th Cir. 1998).

16 The first step requires the ALJ to determine whether the individual is currently  
17 engaging in substantial gainful activity (“SGA”). 20 C.F.R. §§ 404.1520(b), 416.920(b).  
18 SGA is defined as work activity that is both substantial and gainful; it involves doing  
19 significant physical or mental activities, usually for pay or profit. 20 C.F.R. §§ 404.1572(a)-  
20 (b), 416.972(a)-(b). If the individual is currently engaging in SGA, then a finding of not  
21 disabled is made. If the individual is not engaging in SGA, then the analysis proceeds to  
22 the second step.

23 The second step addresses whether the individual has a medically determinable  
24 impairment that is severe or a combination of impairments that significantly limits him from  
25 performing basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). An impairment or  
26 combination of impairments is not severe when medical and other evidence establish only  
27 a slight abnormality or a combination of slight abnormalities that would have no more than  
28 a minimal effect on the individual’s ability to work. 20 C.F.R. §§ 404.1521, 416.921; Social

1 Security Rulings (“SSRs”) 85-28 and 96-3p.1 If the individual does not have a severe  
2 medically determinable impairment or combination of impairments, then a finding of not  
3 disabled is made. If the individual has a severe medically determinable impairment or  
4 combination of impairments, then the analysis proceeds to the third step.

5 The third step requires the ALJ to determine whether the individual's impairment or  
6 combination of impairments meets or medically equals the criteria of an impairment listed  
7 in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525,  
8 404.1526, 416.920(d), 416.925, 416.926. If the individual's impairment or combination of  
9 impairments meets or equals the criteria of a listing and meets the duration requirement  
10 (20 C.F.R. §§ 404.1509, 416.909), then a finding of disabled is made. 20 C.F.R. §§  
11 404.1520(h), 416.920(h). If the individual's impairment or combination of impairments  
12 does not meet or equal the criteria of a listing or meet the duration requirement, then the  
13 analysis proceeds to the next step.

14 Prior to considering step four, the ALJ must first determine the individual's residual  
15 functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). The RFC is a function-  
16 by-function assessment of the individual's ability to do physical and mental work-related  
17 activities on a sustained basis despite limitations from impairments. SSR 96-8p. In making  
18 this finding, the ALJ must consider all of the symptoms, including pain, and the extent to  
19 which the symptoms can reasonably be accepted as consistent with the objective medical  
20 evidence and other evidence. 20 C.F.R. §§ 404.1529 and 416.929; SSRs 96-4p, 96-7p.  
21 To the extent that objective medical evidence does not substantiate statements about the  
22 intensity, persistence, or functionally-limiting effects of pain or other symptoms, the ALJ  
23 must make a finding on the credibility of the individual's statements based on a  
24 consideration of the entire case record. The ALJ must also consider opinion evidence in  
25 accordance with the requirements of 20 C.F.R. §§ 404.1527 and 416.927 and SSRs 96-  
26 2p, 96-5p, 96-6p, and 06-3p.

27 After making the RFC determination, the ALJ must then turn to step four in order to  
28 determine whether the individual has the RFC to perform her past relevant work (“PRW”).

20 C.F.R. §§ 404.1520(f), 416.920(f). PRW means work performed either as the individual actually performed it or as it is generally performed in the national economy within the last 15 years or 15 years prior to the date that disability must be established. In addition, the work must have lasted long enough for the individual to learn the job and performed at SGA. 20 C.F.R. §§ 404.1560(b), 404.1565, 416.960(b), 416.965. If the individual has the RFC to perform his past work, then a finding of not disabled is made. If the individual is unable to perform any PRW or does not have any PRW, then the analysis proceeds to the fifth and last step.

The fifth and final step requires the ALJ to determine whether the individual is able to do any other work considering his RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g). If he is able to do other work, then a finding of not disabled is made. Although the individual generally continues to bear the burden of proving disability at this step, a limited evidentiary burden shifts to the Commissioner. The Commissioner is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the individual can do. *Lockwood v. Comm’r, Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010).

## II. CASE BACKGROUND

### A. Procedural History

Meyer applied for supplemental security income (“SSI”) on May 26, 2015 with an alleged onset date of April 1, 2010. (Administrative Record (“AR”) 18, 203-13.) The application was denied initially (AR 96-109), and on reconsideration. (AR 112-25.) Meyer subsequently requested an administrative hearing. (AR 142-44.)

On August 4, 2017, Meyer and her attorney appeared at a hearing before an Administrative Law Judge (“ALJ”). (AR 63-94.) John J. Komar, a vocational expert (“VE”), also appeared at the hearing. (*Id.*) The ALJ issued a written decision on October 19, 2017, finding that Meyer was not disabled because she could perform work existing in significant numbers. (AR 15-32.) Meyer appealed, and the Appeals Council denied review on July 12, 2018. (*Id.* at 1-7.) Accordingly, the ALJ’s decision became the final decision

1 of the Commissioner. Having exhausted all administrative remedies, Meyer filed a *pro se*  
2 complaint for judicial review on August 27, 2018. (ECF No. 1.)

3 B. ALJ's Decision

4 In the written decision, the ALJ followed the five-step sequential evaluation process  
5 set forth in 20 C.F.R. §§ 404.1520 and 416.920. (AR 15-32.) Ultimately, the ALJ disagreed  
6 that Meyer has been disabled from May 26, 2015, through the present date. (*Id.* at 27.)  
7 The ALJ held that, based on Meyer's RFC, her age, education and work experience, she  
8 was able to perform past work and there were jobs in the national economy that she could  
9 perform. (*Id.* at 26-27.)

10 In making this determination, the ALJ started at step one. Here, the ALJ found  
11 Meyer had not engaged in substantial gainful activity from the application date of May 26,  
12 2015, through the present. (*Id.* at 21.) At step two, the ALJ found Meyer had the following  
13 severe impairments: bilateral hearing loss, plantar fascia syndrome, tinnitus, bipolar  
14 disorder, anxiety, depression, and substance abuse disorder. (*Id.*) At step three, the ALJ  
15 found Meyer did not have an impairment or combination of impairments that either met or  
16 medically equaled the severity of those impairments listed in 20 C.F.R. Part 404, Subpart  
17 P, Appx. 1; 20 C.F.R. §§ 416.920(d), 416.925, and 416.926. (*Id.* at 21-22.)

18 Next, the ALJ determined Meyer had an RFC to perform light work, as defined by  
19 20 C.F.R. § 416.967(b), except she could frequently climb ramps and stairs, but never  
20 climb ladders or scaffolds. (*Id.* at 22-26.) According to the ALJ's RFC determination,  
21 Meyer was capable of frequent balancing, stopping, kneeling, crouching, or crawling. (*Id.*)  
22 However, she was to avoid all exposure to noise above a moderate level and all exposure  
23 to moving mechanical parts and unprotected heights. (*Id.*) Additionally, she could  
24 understand, remember and carry out simple, routine instructions and tasks and  
25 occasionally interact with the public, coworkers, and supervisors, but she could not  
26 perform work at an assembly line pace. (*Id.*)

27 The ALJ found that Meyer's impairments could be expected to cause the symptoms  
28 alleged, but that her statements regarding the intensity, persistence, and limiting effects

1 of those symptoms were not entirely credible. (*Id.* at 24.) In reaching this conclusion, the  
2 ALJ reviewed and discussed the objective medical evidence, medical opinions, and  
3 factors weighing against Meyer's credibility. (*Id.* at 24-26.) The ALJ then determined that  
4 Meyer had no past relevant work. (*Id.* at 26.)

5 Proceeding to step five, and relying on the testimony of the VE, the ALJ determined  
6 that Meyer's age, education, work experience, and RFC would allow her to perform  
7 occupations existing in significant numbers in the national economy, such as:  
8 housekeeping cleaner, collator operator, or photocopy machine operator. (*Id.* at 26-27.)  
9 Accordingly, the ALJ held that Meyer had not been under a disability since the filing of her  
10 application on May 26, 2015 and denied her SSI claim. (*Id.* at 27.)

### 11 **III. ISSUES**

12 Meyer seeks remand on the basis of new medical evidence. (ECF No. 13.) The  
13 new evidence consists of a letter from Psychiatrist Philip D. Malinas, dated August 10,  
14 2018. (*Id.*) Meyer does not provide any additional argument or explanation for the request  
15 to remand. (*See id.*)

### 16 **IV. DISCUSSION**

17 Meyer's motion appears to submit that the basis for remanding her case is a new  
18 letter from her doctor for disability benefits. (ECF No. 13.) Although this Court may  
19 recommend remand for consideration of new evidence, remand is proper only where the  
20 evidence is "material" and "there is good cause for the failure to incorporate such evidence  
21 into the record in a prior proceeding." 42 U.S.C. § 405(g). New evidence is material under  
22 § 405(g) if the evidence bears directly and substantially on the matter in dispute, and if  
23 there is a reasonable possibility that the new evidence would have changed the outcome  
24 of the administrative determination. *Bruton v. Massanari*, 268 F.3d 824, 827 (9th Cir.  
25 2001); *see also Mayes v. Massanari*, 276 F.3d 453, 462 (9th Cir. 2001). Further, to  
26 demonstrate good cause, the plaintiff must demonstrate that the new evidence was  
27 unavailable earlier. *Mayes*, 276 F.3d at 463 (citing *Key v. Heckler*, 754 F.2d 1545, 1551  
28 (9th Cir. 1985) ("If new information surfaces after the Secretary's final decision and the



1 claimant could not have obtained that evidence at the time of the administrative  
2 proceeding, the good cause requirement is satisfied”); *Sanchez v. Secretary of Health &*  
3 *Human Servs.*, 812 F.2d 509, 512 (9th Cir. 1987) (holding that the applicant lacked good  
4 cause to remand for consideration of two psychological examinations prepared after the  
5 applicant's disability determination when his attorney knew of the applicant's memory loss  
6 but failed to explain why the applicant had not requested a mental evaluation or pressed  
7 his mental impairment claim at the hearing before the ALJ)).

8 The new medical evidence Meyer provides to the Court is a letter from Dr. Malinas  
9 dated August 10, 2018. (See ECF No. 13 at 4.) The letter contains a recitation of Meyer's  
10 mental health diagnoses and a brief description of treatment modalities. (*Id.*) The letter  
11 also states that Meyer “is unable to work and [is] not expected to be able to do so for at  
12 least a year.” (*Id.*) Meyer has not shown that the “new evidence” is sufficiently material  
13 to require remand.

14 The letter relates to Meyer's condition outside of the time-period for which the ALJ  
15 adjudicated, from May 26, 2015 to October 19, 2017. (See *id.*; AR 15-32.) The record  
16 indicates that the ALJ already considered Dr. Malinas' treatment notes in making his non-  
17 disability determination, (See AR 24-25; 360-380), and Meyer has not shown how this new  
18 letter would have changed the ALJ's conclusion. Dr. Malinas' statement that Meyer “is  
19 unable to work and not expected to be able to do so for at least a year,” is not a medical  
20 opinion and likely would not have changed the ALJ's decision. See 20 C.F.R. §  
21 404.1527(d) (explaining that opinions stating a claimant is “disabled” or “unable to work”  
22 are “not medical opinions ... but are, instead, opinions on issues reserved to the  
23 Commissioner because they are administrative findings that are dispositive of a case.”)

24 Meyer does not articulate how this letter is material or how it bears directly and  
25 substantially on the matter in dispute and would have changed the outcome of the  
26 administrative decision. (See ECF No. 13.) The letter post-dates the ALJ's decision and,  
27 therefore, does not relate to the period at issue. Further, since Meyer fails to submit any  
28 explanation as to how this document would bear directly and substantially on the matter,



1 this evidence is immaterial as to whether Meyer was disabled during the timeframe of the  
2 ALJ's adjudication. See *Cook v. Colvin*, 2016 WL 805885, at \*5 (D.Nev. Feb. 9, 2016).

3 Thus, the Court finds that Meyer fails to submit that the new evidence, from outside  
4 the timeframe of the ALJ's decision, contained material information bearing directly or  
5 substantially on the matter. Meyer fails to articulate any legal analysis or point to any  
6 errors in the ALJ's determination warranting a remand.

#### 7 **IV. CONCLUSION**

8 Based on the foregoing, the Court finds that Meyer presents no valid basis for  
9 remand and therefore Meyer's motion for remand (ECF No. 13) should be **DENIED**.

10 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Local Rule IB 3-2, the parties may  
11 file specific written objections to this Report and Recommendation within fourteen days of  
12 receipt. These objections should be entitled "Objections to Magistrate Judge's Report and  
13 Recommendation" and should be accompanied by points and authorities for consideration  
14 by the District Court.

15 2. This Report and Recommendation is not an appealable order and any notice  
16 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District  
17 Court's judgment.

#### 18 **V. RECOMMENDATION**

19 **IT IS THEREFORE RECOMMENDED** that Meyer's motion for remand (ECF No.  
20 13) be **DENIED**;

21 **IT IS FURTHER RECOMMENDED** that the Clerk **ENTER JUDGMENT** and close  
22 this case.

23 **DATED:** September 10, 2019.

24  
25   
26 **UNITED STATES MAGISTRATE JUDGE**  
27  
28